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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA, New York, N.Y.
5 v. 22 Cr. 644 (JSR)

6 STEVEN PEREZ, a/k/a "Lucha",
7 Defendant.
8 -----x

9
10 January 8, 2024
11 4:15 p.m.

12 Before:

13 HON. JED S. RAKOFF,
14 U.S. District Judge

15 APPEARANCES

16 DAMIAN WILLIAMS
17 United States Attorney for the
18 Southern District of New York
19 BY: ASHLEY C. NICOLAS
20 MADISON SMYSER
21 Assistant United States Attorneys

22 FEDERAL DEFENDERS OF NEW YORK
23 Attorneys for Defendant
24 BY: ZAWADI BAHARANYI

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1 (Case called)

2 THE DEPUTY CLERK: Will the parties please identify
3 themselves for the record?

4 MS. NICOLAS: Good afternoon, your Honor. Ashley
5 Nicolas and Madison Smyser for the government.

6 THE COURT: Good afternoon.

7 MS. BAHARANYI: Good afternoon, your Honor. Zawadi
8 Baharanyi with the Federal Defenders. I am here on behalf of
9 Lucha El, who is being brought out now.

10 THE COURT: Good afternoon.

11 So, we are here for sentencing. The first item is the
12 calculation of the guidelines, even though I will say, as I now
13 say at all sentences, that the federal sentencing guidelines
14 are completely irrational and will have no bearing on my
15 sentence. This is just another case where that is
16 demonstrated.

17 There is all this controversy, which we will get to in
18 a moment, of how many guns this defendant was involved with and
19 if it's three guns he gets two extra points, if it is eight
20 guns he gets four extra points. I wonder how the brilliant
21 members of the Sentencing Commission came up with that. Why
22 wasn't it one point? Why wasn't it seven points? Why wasn't
23 it three points? This is all hocus-pocus, masquerading as
24 rationality.

25 So the guidelines are of no concern to me. What, of

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1 course, is of concern to me, is the serious crime that was
2 committed and we will get to that later on. But, since I have
3 to calculate the guidelines, the defense objects to the
4 government and the probation office's calculation which was a
5 total offense level of 20 and a Criminal History Category of I,
6 and therefore a guideline range of 33 to 41 months, a sentence
7 higher than any I am remotely contemplating in this case but
8 the defense objects to that calculation on two different
9 grounds.

10 First, the defense says that the four-level
11 enhancement for an offense involving 8 to 24 firearms was not
12 resolved by the jury -- I agree with that -- and is not
13 supported by the evidence and I am not so sure I agree with
14 that second part of the argument; and then the defense also
15 says that the guideline that says there should be another
16 four-level enhancement for the provision that says the
17 defendant used or possessed a firearm or ammunition in
18 connection with another felony offense really should not be
19 invoked on the other felony offense is simply, if you will, the
20 state parallel to the federal offense.

21 So, let me hear first from the government on those
22 objections and then I will turn to the defense.

23 MS. NICOLAS: Thank you, your Honor.

24 I will start with the first which is under
25 2K2.1(b)(1), which is the number of guns involved in the

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1 offense. I think your Honor already alluded to kind of the
2 touchpoint of the government's argument here, what was argued
3 before the jury is not the question. It is actually quite a
4 low standard, it is what is reasonably foreseeable to the
5 defendant as a natural consequence of the unlawful agreement
6 proven by a preponderance.

7 The government laid out, on page 7 of its sentencing
8 submission, while constraining ourselves only to the four trips
9 in which the defendant and Mr. Vereen, the straw purchaser,
10 were located together, that that results in 17 firearms right
11 there, if we only constrain ourselves to those four trips.
12 That is setting aside the firearms that are outside that time
13 span. That also disregards the Glock, which is the additional
14 firearm that the defendant was arrested with, taking us to 18.
15 I think, based on the cell site information which was
16 Government Exhibit 901, was the presentation that supported
17 Mr. Peterson's testimony at trial, combined with the wire
18 transfer information both for the defendant and the
19 co-conspirator with whom he was arrested in Massachusetts,
20 establish by a preponderance that at least 18 firearms were
21 reasonably foreseeable to the defendant as a natural
22 consequence of the criminal agreement.

23 I am happy to stop there.

24 THE COURT: Why don't you stop there and let's hear
25 from defense counsel.

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1 MS. BAHARANYI: Your Honor, we do agree with the
2 government that the question is about reasonable
3 foreseeability. There is a lot of speculation that is going
4 into the government's calculation that should be highlighted.

5 First, they've at least limited now from 24 to 17.
6 Kudos to them for recognizing that the number 24 was also quite
7 speculative. But if we look at the four trips, what we know
8 from these trips is that there was a cell tower that
9 Mr. Vereen's phone pinged off of that Lucha El's phone also
10 pinged off of. We know that there were other cell towers that
11 Mr. Vereen's phone pinged off of that weren't anywhere in the
12 vicinity of Lucha El. That includes cell towers in upstate New
13 York, in New Jersey, in different parts of the Bronx. This was
14 all part of our cross-examination with Mr. Peterson, the expert
15 witness called by the government.

16 What that tells us is that while there were these
17 interactions after certain firearm purchases between Mr. Vereen
18 and between Lucha, we cannot glean from these interactions that
19 all of the firearms that were purchased during this time frame
20 were destined to Lucha El's hands or individuals that were
21 known to him.

22 I think it might be helpful to think of this in the
23 context, perhaps an unsavory context of someone who is dealing
24 drugs. Someone who is dealing drugs to one purchaser, one
25 person who is buying it. That person who is buying from them

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1 in the moment may have no sense of how many other drugs the
2 person they're buying from is dealing. They have no sense of
3 the overall conspiracy. And what the government hasn't given
4 your Honor today or even at trial is any reason to fill in the
5 gaps in the way that they've proposed. There are no
6 communications, text messages, wiretappings that would show
7 that Lucha El was aware of the grand scope of Mr. Vereen's
8 firearm dealings, and even the four dates that we have here,
9 for each of the wire transfers that the government has
10 highlighted, it certainly would not support the suggestion that
11 18 guns were purchased from about \$1,000 worth of money
12 transferred. That just does not compute.

13 So, your Honor, I do think while the government,
14 again, kudos to them, has lowered their number, in reality what
15 we are dealing with is just truly a lack of information and
16 information they cannot provide by a preponderance of the
17 evidence to show that the number was anything from 2, 3, 10, 11
18 firearms. They just don't have the ability to prove that and
19 it is their burden.

20 THE COURT: Before I hear from the government let me
21 make sure. Are you asking for a Fatico hearing on this or are
22 you saying I can decide on the materials that both sides have
23 presented, but of course you interpret that as materials that
24 do not sufficiently support the government's burden.

25 MS. BAHARANYI: It is the latter, your Honor.

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1 THE COURT: Same question to the government. Are you
2 seeking a Fatico hearing?

3 MS. NICOLAS: We are not, your Honor.

4 THE COURT: OK. So go ahead.

5 MS. NICOLAS: Your Honor, I think we need to parse out
6 what defense counsel just said because I think there was some
7 mixing of standards.

8 The question is not whether or not 18 firearms ended
9 up in this defendant's hands. The question is actually if we
10 get past the threshold of eight as part of a foreseeable
11 result, a natural consequence of the unlawful agreement in
12 which the defendant participated, we are talking about the
13 defendant with whom he was arrested in Massachusetts with
14 another person who sent money to Mr. Vereen and it is not just
15 the stand-alone cell site information, it is also the pattern
16 of communications, cell site information, gun purchases and
17 money transfers, and certainly this is not in evidence but the
18 government's closing slides laid that out quite clearly,
19 putting together all of that evidence -- the cell site, the
20 toll records.

21 THE COURT: On this first point I agree with the
22 government. I think the government's position is based on a
23 number of circumstantial inferences but, of course, those are
24 totally permissible to be drawn and the burden is only
25 preponderance and I think they have established that he

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1 reasonably foresaw that eight or more guns would be involved.

2 Let's now turn to the other enhancement. The
3 government's position, while it may comport with the facial
4 language of the guideline and therefore satisfy the textualness
5 of the Supreme Court, seems kind of crazy. It means that every
6 single time there is a parallel state statute, which is going
7 to be true in the many, many, many states, you are just going
8 to have an automatic enhancement. That sounds awfully like
9 double punishment to me.

10 MS. NICOLAS: Your Honor, I actually don't think that
11 is the relevant question in this case where the defendant was
12 charged with an offense relating to how he obtained the guns.
13 And I understand and acknowledge that it is a nuanced
14 difference, but any potential state case in New York related to
15 the firearm would be a possession offense, but even here it is
16 one step further in that there were other offenses, even if we
17 were to argue, which we are not, that that is the point of the
18 statute, the two possession enhancements can't exist together.
19 Here we have a body armor offense, we have an ammunition
20 offense, we have an offense relating to extended magazines, all
21 of which he was charged with in Massachusetts. That's not even
22 the question. The question is, is there another offense,
23 another felony offense that the defendant has committed in
24 connection with his acquisition of a firearm under which he was
25 convicted in the federal courts.

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1 THE COURT: Well, one of the problems, many problems I
2 have with the guidelines but I don't want to spend the next
3 five hours going through them all, is very little legislative
4 history. So, one would have thought that this might have been
5 intended to deal with situations where one obtained a gun
6 illegally in order to carry out a bank robbery or a violent
7 assault or something like that and none of the situations you
8 are positing are really like that. It is more like, yes,
9 Massachusetts has a bunch of those, as does New York, a bunch
10 of laws relating to obtaining handling, so forth, illegal guns,
11 and so it is almost an automatic that in every case involving
12 the federal gun laws there is going to be the enhancement you
13 are referring to. I get your point that went further here that
14 would narrow my hypothetical but I wonder if it is still the
15 same basic ball of wax. But, let me hear from defense counsel.

16 MS. BAHARANYI: Your Honor, that gets at exactly what
17 our issue is with this enhancement and I think the Court
18 actually does have power not to apply it here.

19 THE COURT: I have the power not to consider the
20 guidelines at all and I am going to invoke that power.

21 MS. BAHARANYI: Absolutely.

22 THE COURT: Without any question.

23 MS. BAHARANYI: I don't mean at all to limit,
24 especially given the direction we hope the Court goes and I
25 don't mean to limit the Court's discretion there but, again,

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1 the idea, if we get to the heart of what this enhancement is
2 supposed to be addressing is exactly that, firearms that are
3 possessed in connection with this other felony, conduct or
4 activity, firearm possessed with bank fraud or kidnapping.
5 Something that enhances the dangerousness of this other
6 felonious conduct. Here, the other --

7 THE COURT: Since there is no legislative history
8 maybe what I should do is have a Fatico hearing involving all
9 the members of the Sentencing Commission at the time they
10 enacted this, we could question them. Maybe we won't do that.

11 MS. BAHARANYI: That sounds potentially painful, your
12 Honor.

13 I think here what the Court should also focus on is
14 this guidance from the guidelines in the commentary that the
15 possession of a firearm in connection with the felony, another
16 felony offense, needs to be a firearm that's facilitating or
17 somehow making easier the commission of this other felony
18 offense, and simply possessing a firearm does not make easier
19 the possession of a firearm. That's where I believe the Court
20 has room to certainly not apply the enhancement in this case.
21 It certainly is illogical and the guidelines, the commentary of
22 the guidelines at least does give us some area or room not to
23 apply it.

24 I would also note the government, in its letter,
25 mentioned that there are other felony offenses beyond

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1 possession of a firearm that were happening here. Those felony
2 offenses, again, all relate to possession of ammunition or
3 other firearms or body armor which, again, if anything, body
4 armor potentially could facilitate the carrying of a firearm
5 but I don't think that goes in the reverse direction here, not
6 logically.

7 THE COURT: Well, I'm going to cut this short only
8 because, as I said perhaps too often now, it is all an
9 irrelevancy to my sentence in any event, but I agree with
10 defense counsel. I think I have some room so I'm going to deny
11 that enhancement, which means that the total offense level is
12 16, the Criminal History is I, and the guideline range is 21 to
13 27 months.

14 Now let's talk about what is of importance to the
15 Court which is the factors under Section 3553(a) of Title 18, a
16 statute I am very fond of because I think it sets forth all the
17 relevant factors to any Judge's sentencing. And before I hear
18 from defense counsel and from government counsel and then from
19 the defendant, if he wishes to be heard, let me ask the
20 government what, to me, is an important question, which is
21 where do you rank this defendant in comparison with Mr. Vereen.

22 MS. NICOLAS: It is a difficult question, your Honor,
23 because their conduct is quite different from one another. As
24 it relates to the offense itself, on its face, I certainly
25 think that this defendant maybe is a little less culpable in

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1 terms of he is not necessarily in the gun store at every
2 transaction but in other ways that Mr. Vereen presented
3 mitigating factors: His employment, his service record,
4 otherwise lack of criminal history, general showing of remorse.
5 I don't necessarily think we have that with this defendant so,
6 in some senses, this defendant almost has a more aggravating
7 position which I will talk about more, but I do think it is a
8 difficult one-to-one comparison.

9 THE COURT: OK. That's fair enough. Now let me hear
10 on all issues first from defense counsel, then from government
11 counsel and then from the defendant, if he wishes to be heard.

12 MS. BAHARANYI: Thank you, your Honor.

13 Before I begin, I do want to take a moment to
14 introduce some of the many family members and community members
15 who are here in support of Lucha.

16 THE COURT: Yes. And I should mention I have received
17 and carefully read some very excellent letters on his behalf
18 from friends and family members.

19 MS. BAHARANYI: And of those, his brother Israel
20 Perez, who wrote a letter to the Court, is present. His
21 mother, Maria Gonzalez, is also present who also wrote a letter
22 to the Court, as is Jacqueline Jimenez and Sheryl Jones or
23 "CJ", as she is affectionately known in the community.

24 Your Honor, I do want to also note that at the end of
25 my presentation, as I included in my sentencing submission, I

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1 request the opportunity for Ms. Jimenez -- Jackie Jimenez, who
2 is here, to be able to share a bit more on Lucha El's specific
3 connection to his community and why his absence or the loss of
4 him in the community has been a hardship that extends beyond
5 his family.

6 THE COURT: I'm happy to hear, as long as it is a
7 reasonably brief presentation.

8 MS. BAHARANYI: Absolutely, your Honor.

9 Every single person behind me, your Honor, is here
10 because they know who Lucha El Libertard truly is. They know
11 his heart, they know his actions, they know that he is not the
12 radical, violent, government-hating militia member that the
13 government has made him out to be, not just I anticipate at
14 today's sentencing, but at trial.

15 After our own lengthy amount of time with Lucha El
16 during trial and preparation, we have come to know the same as
17 well. He is someone who cares deeply for his community, for
18 his family. He is someone who loves infinitely, somehow,
19 despite challenging circumstances that have existed since his
20 childbirth. But we are obviously here because he is also
21 someone who made a mistake. The Court knows that in 2020 and
22 2021 there were decisions that Lucha El made in the middle of a
23 global health pandemic, in the middle of time that brought
24 about extreme uncertainty and lack of security to many, but
25 decisions that led him here.

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1 For Lucha El, he is from -- well, grew up for decades
2 in a community in Norwood Bronx around Perry Avenue, and in
3 COVID he saw that community suffering in ways that Officer
4 Smalls took to the stand and described: Gang violence,
5 robberies, rampant shootings, just truly a chaotic almost
6 desperate environment that was brought on by the desperation of
7 an unprecedented pandemic, and at that time Lucha El was a
8 father to a 3-year-old, Hayden, someone who is his child who is
9 truly his love and his joy, and he felt the desire and the need
10 to be a protector. He felt the desire and need to be able to
11 protect him as he has done for so many family members since he
12 was a child. And that happened to coincide with him learning
13 about the Moors, that happened to coincide with him learning
14 about the Second Amendment, and he developed views on what the
15 Second Amendment meant to him.

16 He made the decision, your Honor, to carry a firearm
17 in 2021. The Court now is very well aware of the circumstances
18 of him carrying that firearm. On two occasions, in the Bronx
19 and in Massachusetts, he was arrested in possession of
20 firearms, and immediately after his Massachusetts arrest he
21 went to jail. That's critical here. He spent eight months in
22 custody away from his son, eight months in custody away from
23 his family in a jail far off in Massachusetts that was, itself,
24 suffering from the rampant -- the onslaught of COVID-19. This
25 was a time of immense suffering but also of immense reflection.

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1 Eight months -- eight months and three weeks specifically, your
2 Honor, was punishing and was more than sufficient punishment.
3 And after that time he has not carried a gun since. So, eight
4 months and three weeks in jail was exactly the course
5 correction that I think Courts try to impose in cases like this
6 often.

7 THE COURT: I'm not sure that I have any reason to
8 believe he really changed his mind. We have some evidence that
9 he retained his absurd views of what the law permitted and
10 didn't permit.

11 MS. BAHARANYI: Your Honor, I'm quite happy you raised
12 that because I think that has been so much of the focus of our
13 time in this courtroom, is what he believes, what he feels,
14 what his views are on the law, and we have lost focus on his
15 ability to actually abide by the law.

16 Many Courts, I think, think of sometimes jail as being
17 an opportunity for a taste of punishment, something to course
18 correct. And I think in his case he got more than a taste, he
19 got, quite frankly, a meal, because he got punishment during
20 the darkest time to be incarcerated and that, in fact, changed
21 his actions.

22 His views, his opinions, what he believes the Second
23 Amendment means to others, what he believes the Second
24 Amendment should be or could be, does not change the fact that
25 he is able to abide by the law as it is and we saw that. We

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1 saw that after eight months and three weeks in jail, that he
2 came back into the community, no more contact, no more police
3 contact, no more firearms, no more incidents of misconduct in
4 the community. He focused in on supporting those who he loves,
5 those who have stood by him from day one. He focused in on his
6 son, on his son Hayden. He focused in on what matters most.
7 The community that he was concerned about, he dedicated his
8 time to that community, he did not dedicate his time to
9 carrying around firearms or facilitating others carrying
10 firearms.

11 I guess what I am trying to convey to the Court is
12 that that time worked, and yet that time was not all that he
13 has now faced. So beyond those nearly nine months in custody,
14 he has now spent another four months at the MDC Brooklyn.

15 THE COURT: Yes. Of course, he gets credit for that
16 on any sentence I impose.

17 MS. BAHARANYI: He gets credit for that time. He
18 doesn't technically get any credit for the Massachusetts time
19 but, again, this is all happening -- the arrest occurs in 2021
20 and all of this has happened after, so it is not as though he
21 was arrested and decided again to carry another firearm after
22 these eight months. No. The arrest happened, his
23 incarceration happened, his conduct has been changed. This
24 venue, the criminal justice system, is not here to change
25 people's opinions on what the law should be, that's not what we

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1 are doing here. It is here to ensure that people can abide by
2 the law and can go out into the world and live in that world
3 safely and Lucha El has done that. I think the Court -- not I
4 think, I know the Court has certainly been inundated with his
5 views and opinions on the law in ways that weren't always
6 welcome and he addressed that in his letter to the Court.

7 THE COURT: I have long since forgotten and put out of
8 my mind his thoughts in that regard.

9 MS. BAHARANYI: But during his time on pretrial
10 release, despite those communications, he was in fact
11 compliant. He was someone who was in his home during his
12 curfew as he was required to do, he worked odd jobs in the
13 community to support different community members including a
14 neighbor of his who was renovating his home. He spent eight
15 months outside showing the Court that he is able to, again, be
16 in the community under the supervision without committing
17 crimes, without carrying firearms, without posing a danger.

18 I think what has been lost in this case is something
19 that we truly must focus on here, the conduct and the actions
20 and not his views or opinions because that is certainly not
21 what this space is designed to change.

22 THE COURT: I totally agree that he should not, and I
23 don't think his sentence should reflect in any way his opinions
24 of the law, misguided though they may be, but I think your more
25 fundamental point, which I think you agree with is if he has

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1 got a bunch of silly opinions, well, sobeit, he shouldn't be
2 punished for that. But, of course, I haven't heard much though
3 from you about the fact that at the very time when, as you say,
4 because of the pandemic there was terrible situations in his
5 community, what did he do? I'm not talking about opinions now,
6 I am talking about what he did. He went out and got --
7 illegally -- some guns, for whatever purpose. So he
8 contributed to that violent atmosphere that you have so well
9 described.

10 MS. BAHARANYI: Lucha was not engaging in any violence
11 in the community and --

12 THE COURT: You thought he got a gun not to use it?

13 MS. BAHARANYI: Your Honor, as many in this country
14 do. He got a gun for protection. He got it illegally and that
15 is why we are here, but he did not get a gun to commit --

16 THE COURT: By which you mean that if he had felt
17 someone was threatening him or his child he would have used the
18 gun.

19 MS. BAHARANYI: Your Honor, as many people do, he got
20 a gun for his own sense of security and protection, not to go
21 out and assault, harass.

22 THE COURT: I don't understand that argument. Maybe I
23 am missing something here.

24 MS. BAHARANYI: It is the basis of the Second
25 Amendment.

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1 THE COURT: So you go out, you are confronted with a
2 violent situation on your account, you fear for the safety of
3 yourself or others close to you, and you then go out and
4 illegally get a gun and it is not for the purpose of, if
5 threatened, you will resort to it, it is just so you can keep
6 it in your basement and feel a better sense of security? That
7 doesn't make much sense to me.

8 MS. BAHARANYI: Your Honor, I think it is completely
9 appropriate and fair to have very different views on how the
10 Second Amendment functions in practice and how people feel.

11 THE COURT: I'm not talking about the Second
12 Amendment. He can hold whatever it is he wants with the Second
13 Amendment. I'm talking about what is the logical inference on
14 your account of why he got a gun. On your account he got it so
15 he could protect either himself or those he loved and how would
16 that work if he didn't use it?

17 MS. BAHARANYI: Your Honor, again, we understand why
18 we are here. He received it in a way he should not have but he
19 did not receive it with the intent of going out and committing
20 acts of violence. He received it with the idea that this is a
21 part of how he -- self-defense, how one protects themselves if
22 violence is brought on to them.

23 THE COURT: In which case he would use it.

24 MS. BAHARANYI: Your Honor, again --

25 THE COURT: I agree that's a hypothetical but you are

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1 asking me to credit your hypothetical about what his intentions
2 were and I am just trying to figure out that the extent it is
3 relevant at all, which it may not be.

4 MS. BAHARANYI: His intentions weren't to violate the
5 law and I think even the law creates protections for those who
6 defend themselves, either with a firearm or with their fists.
7 There are exceptions in the law.

8 THE COURT: Quite limited. Quite limited.

9 MS. BAHARANYI: Quite limited, right; but again
10 limited, but they exist and they exist for a reason.

11 THE COURT: All right.

12 MS. BAHARANYI: I think what is important to remember
13 here is this is a person who has no violent history, has never
14 assaulted, attacked, shot, done anything of violence to another
15 individual, and in 2020 and 2021 he had no intention nor did he
16 do violence to other individuals.

17 THE COURT: What was him going up to Massachusetts?

18 MS. BAHARANYI: That was intended as a, I guess, a
19 practice on how to safely use firearms and camping in Maine on
20 private land that the leader of that group had organized.

21 THE COURT: I'm never going to use this firearm, I
22 just want it for protection, but I better figure out how I can
23 go with my friends and learn how to use it. Is that what you
24 are saying?

25 MS. BAHARANYI: I feel much safer in this world if

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1 people, who possess firearms legally, do actually know how to
2 use them.

3 THE COURT: OK.

4 MS. BAHARANYI: And I think that's why gun ranges
5 exist, your Honor. But I think we are stepping away from what
6 I do think is kind of the most critical and compelling,
7 mitigating factor behind Lucha and his story.

8 The government mentioned that there are all of these
9 aggravating factors and they exist but glossed over the
10 importance that Lucha has to his community and the community
11 that he was in fact still giving back to in 2020 and 2021. The
12 different ways he was giving to that community have been
13 outlined in some of the letters of support that we gave to the
14 Court but I don't think necessarily I'm the best speaker on
15 that as someone who is not from that same community, which is
16 why I have asked Ms. Jimenez, someone who has known Lucha El
17 for two decades at this point.

18 THE COURT: I am more than happy to hear from her and
19 will do that now, but I want to just raise one thing for you
20 before we do that. So, I am frequently confronted with the
21 argument: *Judge, Mr. Hypothetical defendant -- I'm not talking*
22 *about this defendant but a defendant just in general -- Judge,*
23 *he is a good family man, has been wonderful to his children,*
24 *they need him, his neighbors speak highly of him, and therefore*
25 *you should, in effect, give him a break.* And what I always

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1 wonder when I hear that argument is who brought this on his
2 neighbors? Who deprived them of his help, of his love, of his
3 contribution? It was he, when he decided to commit a crime.
4 They are his victims in that sense. Now, I don't mean to
5 overstate it but I do think that it is a little ironic that in
6 case after case I'm told, *Oh, Judge, he loves his family and we*
7 *can show how deeply he has loved them.* If he really, really
8 loved his family, why would he go out and commit a crime and
9 deprive them of his help?

10 MS. BAHARANYI: Your Honor, I think from the letters
11 of support there is no question that he loves his family and
12 his community. He is also someone that the Court has
13 recognized has made a mistake and those two things just aren't
14 mutually exclusive. What Lucha El means to his community is
15 something that we want to speak more to the Court about but the
16 reason why we want to make sure your Honor understands this is
17 because I'm asking for him to go back to the community after he
18 has already faced serious punishment for his conduct. So this
19 isn't a request to have him go back and time-served because he
20 hasn't spent any time in jail. No. He has spent eight months
21 and three weeks, another four months at the MDC, he has been
22 seriously punished for his actions in 2020 and 2021, and now I
23 ask the Court to give him the opportunity to go back to the
24 space and the people who do mourn his absence, who do love him,
25 and who he loves and he has supported for several years, not in

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1 my own words, in my own opinion, but in the words and opinions
2 of those very community members.

3 THE COURT: All right. Well, let me hear from
4 Ms. Jimenez.

5 MS. BAHARANYI: One moment, your Honor. Logistically,
6 Judge, I should have asked if you would you like for her to
7 stand at the podium?

8 THE COURT: Yes.

9 MS. JIMENEZ: Good afternoon.

10 THE COURT: Good afternoon.

11 MS. JIMENEZ: Thank you for giving me the opportunity
12 to speak this afternoon.

13 My name is Jacqueline Jimenez. I have known Lucha for
14 most of his life. We have been neighbors in the same
15 community, the same building, watched him grow up. I am a
16 little older than he is so he grew up mostly with my son and a
17 lot of the other youth in the building.

18 I am currently working in social services, I am
19 pursuing a masters in social work in grad school at Hunter
20 College, and I currently volunteer with a friend who has a
21 foundation called Uplife, which I intend to involve Lucha in
22 when he does come home. We service the community by giving out
23 food, back to school events for children, just a number of
24 things.

25 I guess my reason for wanting to talk is to, I guess,

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1 help you see something beyond what you are reading on paper.
2 And I am hearing what you are saying, I am trying to digest
3 what you are saying but I feel like it is important for you to
4 know that who you are seeing here is not a violent man. And,
5 you know, you spoke of people's acts and how they affect the
6 family and the people that they love and you are right, yes, it
7 has affected us all deeply, but I don't think we consider
8 ourselves victims of his crime, we just -- you know, he made
9 mistakes and we still love him even though he made those
10 mistakes. But beyond the mistakes, he is a man with many
11 different facets. He helps the community, he is passionate,
12 not violent. He is always, you see him around the community,
13 he's helping somebody, helping unload boxes at a store or
14 helping someone paint their apartment, helping as -- cliche as
15 it sounds -- helping the old lady across the street and with
16 her bags. Like, you can always find him in a heated
17 conversation, in a debate, but positive things. You know?
18 Like telling children to go back to school. Come off the
19 corner, let's go play basketball at our local park.

20 You know, from myself, aside from seeing him grow up,
21 he was always involved in sports, he was an athlete. We have a
22 common love of boxing and, most recently, I am really grateful
23 for him because he helped my son go through a very challenging
24 time. My son is one of the people that wrote letters, his name
25 is Donald, and he helped him through a very challenging time.

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1 He was the guy that came and knocked on my door every single
2 morning to make my son get up out of bed and go play basketball
3 or do some type of activity.

4 So, I don't know. I just -- I don't know if I can say
5 enough about him but I just really would like you to maybe
6 reflect a little bit more on the fact that he is not a violent
7 person, he is not the words that you -- the charges that are
8 being brought upon him. He is more than that. We are all more
9 than our mistakes. You know? We are not just -- we are not
10 just our mistakes, we are more than that, and we deserve the
11 opportunity to redeem ourselves and I feel like he has shown
12 that during his time after being incarcerated.

13 While he has been home I have spent many hours talking
14 to him about his plans and his life. I see how he is with his
15 child. I don't consider myself a victim of his crime, I am
16 honored to know him as a person. I think anyone who knows him
17 is deeply affected by him in a positive way, regardless if you
18 agree with his opinions, to say the least. You know, I don't
19 have to agree with him to know that he is a thinker, he is a
20 good man, and he is brave to go against the grain of things
21 that maybe people don't normally speak about.

22 Do you have any questions for me?

23 THE COURT: No. It is very helpful and I much
24 appreciate hearing from you.

25 MS. JIMENEZ: Thank you for your time.

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1 THE COURT: Thank you.

2 MS. BAHARANYI: Thank you, Ms. Jimenez.

3 Your Honor, thank you for giving us that opportunity
4 for having someone from his community address the Court. And I
5 will close with this: He is facing the harshest of conditions
6 now. As the Court is aware from the exhibit we provided
7 showing Judge Furman's latest order about the conditions at
8 MDC, this has been his reality, a space where he isn't
9 connected to his community. He can rarely, if ever, speak to
10 his family. His ability to practice his religion has been
11 severely limited because of the chaos at the MDC Brooklyn. And
12 this, coupled with the significant time he spent in
13 Massachusetts and the additional time he faces because he has
14 to go and face the resolution of those charges and faces
15 another two to four years, but all of that together is more
16 than sufficient punishment with the request that we have made
17 for five months, especially for someone who is not the gun
18 trafficker in this scenario. He is not someone who obstructed
19 justice. And he is someone who has shown he can abide by the
20 law.

21 THE COURT: Thank you very much.

22 Let me hear from the government.

23 MS. NICOLAS: Thank you, your Honor.

24 Defense counsel referred to the heart of the Second
25 Amendment and I want to be really clear about what the heart of

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1 the Second Amendment is and why that is not what we saw here.

2 The heart of the Second Amendment is lawfully obtaining a
3 firearm to have in your own home for your own protection. It
4 is not unlawfully obtaining multiple firearms, so that in one
5 instance you can stand on the street with the gun in the same
6 bag as your personal use narcotics and on another occasion
7 transport that firearm with your militia on the way up to some
8 kind of unregulated land in Maine that you are going to go fire
9 off live rounds on for whatever purpose that is.

10 What the defendant did is not the heart of the Second
11 Amendment, he is not being punished because of his words. He
12 was charged with crimes because there are federal regulations,
13 there are federal laws that governs the way in which firearms
14 are sold and possessed and regulated to keep everyone safe.
15 They're not just laws that exist for fun, they're not
16 frivolous, they're not -- you know, the defendant referred to
17 them as mandates and legalities and all that other stuff. That
18 could not be further from the truth. They exist because
19 they're important. Because without people like the defendant,
20 there is no way to lawfully get a firearm in New York City.
21 The defendant invited those guns into the same community that
22 he is standing here today telling us he cares so deeply about.
23 That's reality. This is not a man who walked into a gun store
24 and made some kind of administrative mistake and accidentally
25 got a gun.

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1 The jury found he willfully violated the law --
2 willfully -- violated the law. And I think part of the
3 timeline here is pretty disturbing and one we need to keep in
4 the forefront of our mind when we talk about specific
5 deterrence and the sincerity of any kind of acceptance of
6 responsibility that the defendant might have now and that is
7 the timeline from the Bronx arrest to the Massachusetts arrest.

8 The defendant gets arrested by the NYPD possessing a
9 firearm in the Bronx. At the time of that arrest he is told
10 you need a permit for this. He is told this is not something
11 you can do. And he tells the officers, sorry, disagree, I get
12 to decide what laws apply to me, I don't need it, I don't need
13 a permit, a permit is permission, I don't need permission.

14 Two weeks later he is with a convoy in Massachusetts;
15 it is a two-car convoy. It is a convoy. It is guys dressed
16 like they're going into battle and they're not carrying rubber
17 bullets, they're carrying thousands of rounds of real
18 ammunition, over 20 magazines, run magazines, with huge
19 capacities; semi-automatic long gun rifles, of which the
20 defendant was wearing one and at another point holding another.

21 He didn't make a single mistake on a form. That is
22 not what we are talking about. He didn't make a single mistake
23 when he got a gun from someone. He made the same, quote
24 unquote, mistake over and over and over again because he
25 decided he didn't want to abide by laws that he didn't like.

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1 That is not how society works. There is of course of general
2 deterrence issue here. There is a specific deterrence issue
3 here. This defendant has made clear these laws don't apply to
4 him, he is not going to do it.

5 I also want to talk about COVID for a second because,
6 again, timing is important.

7 While we are supposed to be hearing about COVID being
8 difficult and making everyone's lives difficult and there is no
9 denying that was reality, we all lived it, the defendant was
10 loading up his convoy with his friends to go drive to Maine to
11 go shoot some guns. He was moving interstate, freely, on 4th
12 of July weekend, while we are supposed to think that he was
13 desperate and this was a mistake that he made out of
14 desperation during COVID. The reality is quite clear, he was
15 getting guns to do whatever he wanted because that's how he
16 views the law, it doesn't apply to him.

17 That's why gun ranges exist. That's another thing I
18 heard. This wasn't a gun range. This wasn't harmless,
19 innocent activity. This defendant invited guns into his
20 community, he did it over and over again when he knew what he
21 was doing was wrong, your Honor, and for that reason a
22 substantial period of incarceration is appropriate here.

23 THE COURT: Let me ask you one more particularized
24 question which is should I give him, in your view, a credit,
25 since it won't be credited as a technical matter, for the time

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1 he spent in jail in Massachusetts as opposed to time he spent
2 here which will be credited?

3 MS. NICOLAS: I certainly think that's a relevant
4 3553(a) factor for your Honor. What I will say about that is
5 the defendant's pretrial detention in Massachusetts was also,
6 in part, predicated on his refusal to identify himself, his
7 refusal to comply with booking procedures. So, I do think that
8 that pretrial detention took, in effect, factors that are not
9 relevant to what we are here for today.

10 I will also note he is getting ready to stand trial in
11 February on that Massachusetts case which, I imagine, will be
12 putting before the judge a lot more than was put before the
13 Court here as it related to the details of that traffic stop.
14 So while it is relevant, your Honor, I don't think it is
15 tremendously mitigating.

16 THE COURT: Let me hear from defense counsel and then
17 from the defendant, if he wishes to be heard.

18 MS. BAHARANYI: Thank you, your Honor. Just briefly.
19 The government's very, very impassioned speech here
20 feels misplaced. If this were a conversation, a sentencing
21 that were taking place after his arrest in 2021, fair game;
22 there needs to be punishment, there needs to be consequence,
23 there is a need for specific and general deterrence. But, in
24 fact, we are having this conversation about appropriate
25 punishment after he has already been seriously and sufficiently

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1 punished, your Honor, and that's what has been lost sight of.

2 We are having this conversation about whether jail is necessary
3 to course correct or correct his conduct in the future after
4 jail has already been imposed in his life and after it has
5 already, in fact, changed his conduct and changed his actions.

6 THE COURT: Well, of course that is highly relevant to
7 one factor, namely specific deterrence. It doesn't really go
8 to most of the other factors.

9 MS. BAHARANYI: Your Honor, I do think it speaks to
10 general deterrence as well. The credibility of the system is
11 not just about whether people are punished for doing bad
12 things, for breaking the law, but it's about whether that
13 punishment is in fact proportional. That's how it has any
14 credence, any credibility with any community that might learn
15 about this case. And if the Court were to impose --

16 THE COURT: I don't know how you come to that. It is
17 rare that anyone who is considering a future crime gets into
18 detailed analysis of why Mr. Jones received X months and
19 Mr. Smith received Y months. What is relevant for someone who
20 is thinking about committing a crime is, oh, the people who
21 committed that crime got serious time. I really think it is --
22 I don't know of anywhere in the criminological literature where
23 it has been shown that defendants who are considering future
24 crimes -- that's what general deterrence is all about -- get
25 into an analysis of, oh, he got a lower sentence but that was

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1 because he had learned his lesson or anything like that. That
2 is highly relevant for specific deterrence but I don't see how
3 it is relevant for general deterrence.

4 MS. BAHARANYI: Your Honor, if we are focusing on
5 statistics then, truly, what has been proven to be most
6 effective or effective when it comes to general deterrence
7 isn't at all the length or severity of punishment that someone
8 received, but is, in fact, the fact that someone has been
9 arrest and about been punished.

10 THE COURT: That's the biggest factor but that is only
11 factor. That factor we have known for about a hundred years,
12 well-documented, and I agree with you, that's the single most
13 established factor in general deterrence but it is, by far,
14 from the only factor.

15 MS. BAHARANYI: I think if we are to assume that if we
16 step beyond what has been proven in the science and we are now
17 a little bit speculating on what will affect the community and
18 what they will believe or how they will be affected by
19 someone's sentence, then I do think it is completely fair to
20 believe the community, like the community here, will have the
21 capacity to understand the difference between excessive
22 punishment and the right punishment, just punishment.

23 THE COURT: All right.

24 MS. BAHARANYI: And what we have asked for, your
25 Honor, truly is the just punishment given the totality of the

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1 circumstances of his overall punishment here during COVID, in
2 MDC when it is at its worse. Anything beyond the five months I
3 have asked would be beyond what is necessary and no longer
4 carries the deterrent weight or effect that I believe the Court
5 is concerned about.

6 THE COURT: Let me hear from the defendant, if he
7 wishes to be heard.

8 MS. BAHARANYI: Your Honor has received a letter from
9 Lucha and he does not wish to make any further statements
10 beyond what he provided to the Court in his letter.

11 THE COURT: OK. That's fine.

12 So, on the one hand I think I take his criminal
13 activity to be considerably more serious than the defense is
14 arguing. I think the government is absolutely right and,
15 indeed, the jury found that this defendant intentionally,
16 willfully engaged in this misconduct, blatantly in violation of
17 the law and as part of an ongoing relation with others who were
18 doing the same. And where, at the end of the story, I think
19 the factors under Section 3553(a) would all counsel a sentence
20 not unlike the two years I gave to Mr. Vereen, there are,
21 however, I think two mitigating factors that warrant a lesser
22 sentence. The first is the time he has already spent in jail
23 in Massachusetts, which will not be credited against this
24 sentence unlike the time he spent in federal custody but which
25 is nevertheless real punishment for activity very closely

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1 related to what the defendant stands accused of here. Not
2 identical, but related. And while I am not particularly
3 convinced that this defendant learned his lesson from that
4 incarceration, I think that is much too simplistic when you are
5 dealing with someone as complicated as this defendant. But I
6 think some credit should be given for that.

7 The much bigger factor is the numerous people, many of
8 whom are here today, who have supported him and told me of his
9 good side, of his good nature. My own view of sentencing,
10 which is part of Section 3553(a) but seems to me to be
11 especially important, is that a person at this moment of
12 sentence be judged by the entire character he has demonstrated
13 and not just by his mistakes. I thought Ms. Jimenez made that
14 point quite eloquently and the fact that there are all of these
15 people who have not only written to me but are here today to
16 say that this defendant has a good side that they recognize,
17 that they've experienced, that they have seen, is quite
18 important to me.

19 So I'm going to give a lesser sentence than the one I
20 contemplated. It is nothing like the sentence that defense
21 counsel asks for because I think that grossly understates both
22 the crime itself, its potential for violence, and the
23 defendant's involvement with a different kind of community, if
24 you will, a community dedicated to the illegal possession of
25 guns and the seeming preparation to use them.

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1 Putting all of these factors together, the sentence of
2 the Court is that the defendant is sentenced to 16 months in
3 prison, that's on each count, concurrently, and similarly, to
4 three years of supervised release, concurrent on each of the
5 counts.

6 No fine will be imposed because the Court makes a
7 finding that this defendant is not in a position to pay any
8 meaningful fine now or in the foreseeable future. There is,
9 however, a \$200 mandatory special assessment that must be paid.

10 The terms of supervised release are, first, mandatory
11 conditions that the defendant not commit any other federal,
12 state or local crime; that he not unlawfully possess a
13 controlled substance; that he cooperate in the collection of
14 DNA; and that within 15 days of his release from prison he
15 submit to one drug test to be followed by two periodic drug
16 tests thereafter, as determined by the probation officer.

17 There will also be imposed standard conditions 1
18 through 12. They appear on the face of the judgment but also
19 will be gone over with the defendant when he begins his period
20 of supervised release, which he will do by reporting to the
21 nearest probation office within 72 hours of his release from
22 prison.

23 And finally, there are the special conditions:

24 First, the defendant will participate in an outpatient
25 treatment program for drugs and alcohol under standard terms;

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1 and secondly, that he will be supervised by the district of his
2 residence.

3 Now, before I advise the defendant of his right of
4 appeal, let me ask counsel for both sides whether there is
5 anything else we needed to take up.

6 Anything further from the government?

7 MS. NICOLAS: Your Honor, just a couple of
8 housekeeping matters.

9 First, we would ask that the Court adopt the factual
10 findings that are set forth in the presentence report. There
11 is no objections from the government on that.

12 THE COURT: Yes. I adopt the presentence report other
13 than I disagree with the calculation, as previously indicated.

14 MS. NICOLAS: The other matter, your Honor, is that
15 the government would ask that the forfeiture order be made
16 final as to the firearms in the case. There is no money
17 judgment but it is the firearm.

18 THE COURT: Any objection to that?

19 MS. BAHARANYI: No objection, your Honor.

20 THE COURT: So ordered.

21 MS. BAHARANYI: Your Honor, on the special conditions,
22 probation recommended outpatient drug treatment. I don't
23 believe that is an appropriate condition in this case because
24 Lucha El has no history of abusing illegal substances. The one
25 reason for this recommendation is because of his prior use of

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1 marijuana and that was before he was on pretrial supervision.

2 THE COURT: I wondered about that myself. I will
3 withdraw that special condition.

4 MS. BAHARANYI: Thank you. That's all on our behalf.

5 THE COURT: Did you want to make any recommendation as
6 to where he should be housed?

7 MS. BAHARANYI: Absolutely, your Honor. We do ask he
8 be housed as close to New York City as possible.

9 THE COURT: I will make that recommendation. I can't
10 order it, as you know, but I will recommend it.

11 So, speaking to the defendant, let me advise you,
12 first, that you have a right to appeal the sentence.

13 Do you understand that?

14 THE DEFENDANT: Yes.

15 THE COURT: If you can't afford counsel for the
16 appeal, the Court will appoint one for you free of charge.

17 Do you understand that?

18 THE DEFENDANT: Yes.

19 THE COURT: That concludes --

20 MS. NICOLAS: Your Honor, the government now moves to
21 dismiss the underlying indictment.

22 THE COURT: Yes. Thank you very much. That motion is
23 granted.

24 Very good. Thanks a lot.

25 ooo